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March 30, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W., Room TW-A325
Washington, D.C. 20554

Re: Ex parte presentation in CC Docket Nos. 01-92 and 96-262

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, AT&T Corp. ("AT&T") submits this response to the February 27, March 1 and March 26, 2004 written ex parte submissions in this proceeding by NewSouth Communications ("NewSouth").[1] NewSouth there asserts that the Commission should "clarify" that the benchmark rate for interstate access charges by competitive local exchange carriers ("CLECs") after June 21, 2004 prescribed in the Commission's CLEC Access Charge Order[2] permits a CLEC to charge interexchange carriers ("IXCs") for tandem switching even if that tandem functionality is instead being provided to the IXC by an incumbent local exchange carrier ("ILEC") tandem that is subtended by the CLEC's switching system.

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1 Letters dated February 27, March 1 and March 26, 2004 to Marlene H. Dortch, Secretary, FCC, from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications ("NewSouth ex partes").

2 Access Charge Reform, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("CLEC Access Charge Order").

The relief that NewSouth requests is in no sense a "clarification" of the Commission's benchmark rate regime. Rather, it represents an entirely unjustifiable fundamental change in the Commission's longstanding policies governing the obligation of local carriers to charge IXCs only for those access services they actually provide. NewSouth's unjustified proposal likewise fundamentally alters the balance struck in the CLEC Access Charge Order between the right of CLECs to charge for access under tariff and the concomitant duty of IXCs to interconnect with those local carriers.

In the CLEC Access Charge Order, the Commission recognized that CLECs exercise bottleneck monopolies for access services and that market forces were insufficient adequately to reduce CLEC access charges to reasonable levels. Id. ¶¶. 31-32. Accordingly, the Commission adopted a "benchmark" regime for tariffed CLEC access that prescribed a phased set of declining maximum levels at which CLECs could lawfully file tariffed interstate access charges in their existing non-rural service area. Id. ¶¶ 45, 80. Under this phased-in set of "safe harbor" rates, after June 20, 2004, the CLECs' tariffed access rates in non-rural service areas that those carriers served as of the effective date of the Commission's order may not exceed the switched access rate of the competing ILEC. Id. ¶ 51.[3]

In light of its determination to establish this regime for tariffed CLEC access rates, the Commission went on to conclude that calls originated from, or terminated to, CLECs whose rates fall within the benchmark levels are reasonable requests for service. Accordingly, pursuant to Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), the Commission required IXCs to physically interconnect with CLECs whose tariffed access rates fall within the Commission-prescribed benchmark levels. Id. ¶ 94.

Although it did not prescribe any specific rate structure that CLECs must adopt for their access services, the Commission limited CLECs to rates (whether they be charges on a flat-rate or per-minute basis) that are "equivalent to those the ILECs receive" from their IXC customers. Id. ¶ 54. The Commission described the Part 69 rate elements and functions that CLECs are permitted to charge in computing their benchmark charges:

> "Thus, the safe harbor rate applies, but is not necessarily limited, to the following specific rate elements and their equivalents: carrier common line (originating), carrier common line (terminating); local end office switching; interconnection charge; information surcharge;

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[3] CLECs that have entered new service areas subsequent to the effective date of the Commission's order are required immediately to set their access rates at the level of the competing ILEC. CLEC Access Charge Order ¶ 58.

tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching."[4]

NewSouth now contends that "to the extent that a CLEC provides access tandem functionality," the Commission's rulings described above "require that [a CLEC] be permitted to charge *all* access elements, including tandem rate elements" (emphasis supplied). Remarkably, NewSouth asserts the CLEC's entitlement to assess such tandem switching charges even in instances where an ILEC is already providing tandem switching to an IXC for traffic routed through the NewSouth switch and the IXC has paid ILEC tandem switching charges. NewSouth makes no effort to contradict the fact that in such a configuration its switch does not provide any tandem functions whatsoever. Rather, the CLEC switch is no different from any other end office that subtends the ILEC tandem.[5]

As a threshold matter, NewSouth's double billing scheme is fundamentally at odds with longstanding Commission prohibition against LECs charging their access customers for functions or features the local carrier does not in fact provide.[6] Nothing in the CLEC Access Charge Order even implies, much less purports to create, any exception to this well-established Commission policy. More fundamentally, however, NewSouth's "clarification" is squarely at odds with the Commission's objective in the CLEC Access Charge Order of establishing a benchmark rate mechanism under which, as of June 20, 2004, non-rural CLEC tariffed access rates may not exceed the competing ILECs' level.

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4 Id. n. 126.

5 The fact that NewSouth does not provide any tandem access service is further confirmed by the fact the industry-standard Local Exchange Routing Guide ("LERG") apparently does not identify any local switch that subtends NewSouth's "tandem." See ex parte letter dated March 22, 2004 in CC Docket Nos. 96-262 and 01-92 from Henry G. Hultquist, MCI, p. 2.

6 For example, in Bell Atlantic Telephone Companies, 6 FCC Rcd 4794 (1991), the LEC had filed tariff changes to assess carrier common line ("CCL") charges on connections from its local switches to a radio common carrier ("RCC'") switching office, despite the fact that the facilities used to connect to the RCC's switch are not classified as common lines. The Common Carrier Bureau rejected the tariff on the ground that it "would apply [CCL] charges to a service that does not use common line facilities . . . ." Id. ¶ 12. The Bureau further observed that, even apart from that improper charge, the tariff "would result in charges to the IXC and the RCC for the same facility" and that this double recovery was also problematic. Id.,¶ 9

Under the NewSouth view, a CLEC would be entitled to charge an IXC for an access function (tandem switching) that it does not in fact provide, even though an ILEC would not be entitled to similarly assess tariffed charges for functions that it does not furnish to an IXC. NewSouth's material revision to the Commission's benchmark access rate regime would thus effectively allow a CLEC to recover *more* than the equivalent charges by an ILEC – exactly the result the Commission's order did *not* contemplate.[7] Moreover, the Commission's conclusion in the same order that IXCs are obligated to interconnect with and purchase tariffed access from CLECs was clearly premised on the fact that under the benchmark rate regime those tariffed access rates are presumptively reasonable and, thus, that calls originated from or terminated to the CLECs constitute reasonable requests for service under Section 201(a). If accepted, NewSouth's claim therefore would require the Commission to revisit and fundamentally to restructure the IXC-CLEC interconnection and access model established in the CLEC Access Charge Order.

The justifications NewSouth advances for its distorted construction of the CLEC Access Charge Order do not withstand even cursory analysis. For example, NewSouth's observation that the Commission has not obligated CLECs to follow its Part 69 rate structure nor has otherwise prescribed any specific elements for tariffed CLEC access rates is simply beside the point. As demonstrated above, the CLEC Access Charge Order permits those carriers to assess either flat-rated or per-minute access charges on IXCs subject to the limitation that the CLECs' rate levels under those structures do not exceed the revenues that would be received by IXCs for providing the same functions under the Part 69 rules.

Equally meritless is NewSouth's contention that it would somehow be "arbitrary" for the Commission to preclude a CLEC from assessing tandem switching charges on an IXC while allowing an ILEC to assess those same charges where the NewSouth switch subtends the ILEC tandem switch (which NewSouth's own network diagram makes clear is the case here). There is nothing even remotely "arbitrary" in requiring CLECs to adhere to the Commission's long established policy (and common sense principle) that carriers – including, but not limited to, CLECs – may charge only for those services that they actually provide to their customers.

NewSouth's additional contention that IXCs can protect themselves from the impermissible double charging that its "clarification" would impose is another makeweight. IXCs have always had the option to determine their most efficient network configurations, and where appropriate (based on traffic volume, port capacity, and other factors) to directly trunk from their points of presence ("POPs") to LEC end

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[7] See CLEC Access Charge Order ¶ 54 (stating that the Commission's objective was "to permit [competitive LECs] to receive revenues equivalent to" ILEC charges to IXCs).

offices in lieu of relying on tandem routing. NewSouth should not be permitted to distort those economic and engineering judgments by forcing IXCs to configure their networks inefficiently simply to minimize artificial tariffed access charges imposed on them for functions that they do not receive from a CLEC.[8]

It would also be entirely inapposite for NewSouth or any other CLEC to equate the treatment of CLEC TELRIC-based reciprocal compensation charges under the Wireline Competition Bureau's Virginia Arbitration Order[9] with access rates under the CLEC Access Charge Order. Under the Virginia Arbitration Order (and existing Commission rules), where a CLEC switch serves the same geographic area as an ILEC local tandem switch, the CLEC is entitled to receive reciprocal compensation at the TELRIC-based local tandem switch rate, reflecting the advanced efficiency of the CLEC network. The Bureau recognized in that decision that it would be contrary to sound public policy to penalize CLECs financially vis-à-vis their ILEC competitors for deploying more efficient architectures that served with one switch the same geographic area as an ILEC local tandem with subtending central offices.

Such intercarrier arrangements that promote deployment of efficient networks make sense, especially where there is no duplication of functions and the interconnecting parties are competitors exchanging traffic at TELRIC-based rates. By contrast, NewSouth's efforts to preserve its receipt of non-cost-based payments for the inefficient provision of duplicative functions (or functions that the CLEC does not provide at all) reflect no more than an effort to gouge captive IXCs. Far from promoting the deployment of efficient networks, if the Commission condones NewSouth's proposal it will be countenancing the continuation of a subsidy-laden revenue stream that encourages carriers to deploy inefficient networks in order that they may continue to extort excessive charges from IXCs for fictitious or duplicative and unnecessary functions. The Commission should outlaw, rather than encourage, such tactics.

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[8] The Commission's benchmark rate regime applies solely to tariffed access charges. Nothing in the CLEC Access Charge Order precludes those carriers from offering (or IXCs from agreeing to) non-tariffed access arrangements on rates, terms and conditions that the parties conclude are mutually beneficial (for example, based on price and/or qualitative advantages offered for direct trunking from the IXC POP to a CLEC switch).

[9] Petitions of WorldCom, Inc. and AT&T Communications Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., CC Docket Nos. 00-218, 00-251, Memorandum Opinion and Order, DA 03-2738 (Wireline Compet. Bur. rel. Aug. 29, 2003) ("Virginia Arbitration Order").

For all of the reasons stated above, the Commission should categorically reject NewSouth's requested "clarification" of the requirements imposed by the CLEC Access Charge Order.

Respectfully submitted,

/s/

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